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IN THE

Supreme Court of the United States

October Term—1966

No. 292

ELIZABETH JOAN ALLEN and ALICE EDNA STUHMER, individually and as Executrices of the Estate of CHESTER A. ALLEN, Deceased,

Petitioners,

against

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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October Term—1966

No. ———

———o———

ELIZABETH JOAN ALLEN and ALICE EDNA STUHMER, individually and as Executrices of the Estate of CHESTER A. ALLEN, Deceased,

Petitioners,

against

UNITED STATES OF AMERICA.

———o———

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in the above-entitled case.

Opinions Below

The opinion of the United States District Court for the Eastern District of New York is reported at F. 2d . The opinion of the United States Court of Appeals for the Second Circuit is reported at — F. 2d — and is reprinted in Appendix A, *infra.*

Jurisdiction

The judgment of the court of appeals was entered on March 29th, 1966 (Appendix A, *infra,* p. 5). The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254.

Question Presented

Whether under Section 2056(b)(1) of the Internal Revenue Code must the character, nature and extent of the property passing to the surviving spouse be determined as of the precise moment of death of the decedent regardless of subsequent events come to pass.

Statute and Regulation Involved

The statute involved, Section 2056 of the Internal Revenue Code of 1954 and the Regulation involved, are set forth in Appendix B, *infra*, p. 15.

Statement

The decedent, Chester A. Allen, died leaving a Last Will and Testament granting to his wife an election under his Will to take her statutory share outright or to take his entire estate subject to a contractual obligation to make a certain testamentary disposition of her property and the property she received from the decedent upon her death.

The Circuit Court of Appeals for the Second Circuit held that by reason of the fact that the surviving spouse had to exercise such election that the property passing to her did not qualify for the marital deduction and that its interpretation of said Section 2056 of the Internal Revenue Code was that in order to qualify for the marital deduction the character, nature and extent of such interest must be determined as of the precise moment of the death of the decedent.

Reason for Granting the Writ

Th property passing to the decedent's surviving spouse under the provisions of his Will was only dependent upon her executing an agreement, the terms of which agreement

are set forth in his Will. The Circuit Court of Appeals ruled that because such an agreement had to be executed that it was not possible to determine what property passed from the decedent to the surviving spouse and thus violated the terminable rule set forth in Section 2056 of the Internal Revenue Code.

The petitioner claimed that the Commissioner's Regulations (Section 20.2056 (e)-2 (c)) applies to this precise situation and therefore the property passing to the decedent's surviving spouse does not violate the terminable interest rule.

The decision of the Circuit Court of Appeals decides an important question of Federal Law which question had not been, but should be decided by this Court.

CONCLUSION

This petition for a writ of certiorari should be granted.

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Brooklyn, New York.

APPENDIX A

(Opinion and Judgment of the Court of Appeals)

(OPINION)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 160—September Term, 1965.

(Argued March 1, 1966 Decided March 29, 1966.)

Docket No. 29924

ELIZABETH JOAN ALLEN and ALICE EDNA STUHMER, individually and as Executrices of the Estate of CHESTER A. ALLEN, Deceased.

Appellants,

against

UNITED STATES OF AMERICA,

Appellee.

Before:

LUMBARD, *Chief Judge,*

KAUFMAN, *Circuit Judge,* and FEINBERG, *District Judge.**

Appeal from a judgment of the United States District Court for the Eastern District of New York, Zavatt, *J.*, granting appellee's cross-motion for summary judgment

* Sitting by designation.

dismissing appellants' complaint seeking a refund of estate taxes in the amount of $18,271.33, on the ground that the marital bequest in question constituted a non-deductible terminable interest pursuant to Internal Revenue Code of 1954, § 2056(b)(1).

Affirmed.

J. COURTNEY MCGROARTY, WINGATE & CULLEN, Brooklyn, N. Y. (John F. Anderson, on the brief), for appellants.

BENJAMIN M. PARKER, Attorney, Department of Justice, Washington, D. C. (Richard M. Roberts, Acting Assistant Attorney General, Lee A. Jackson and Robert N. Anderson, Attorneys, Department of Justice, Joseph P. Hoey, United States Attorney for the Eastern District of New York, Jerome Ditore, Assistant United States Attorney, on the brief), for appellee.

KAUFMAN, *Circuit Judge*:

Contending that a rather unorthodox bequest by Chester A. Allen, deceased, to his wife, Kathleen M. Allen, qualifies for the marital deduction,[1] the Executrices under Allen's will appeal from the dismissal of their complaint seeking a refund of estate taxes in the amount of $18,271.33.[2] For

---

[1] Internal Revenue Code of 1954, § 2056(a) provides:

For purposes of the tax imposed by section 2001, the value of the taxable estate shall, except as limited by subsections (b), (c), and (d), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

[2] This action was heard on cross-motions for summary judgment. The District Judge denied the Executrices' motion for judgment in the full amount of the requested refund and granted the government's motion to dismiss the complaint with prejudice.

the reasons set forth below, we believe that the District Judge reached the proper result and, therefore, affirm.

The facts are essentially uncontroverted and lend themselves to simple statement. On September 3, 1953, Chester A. Allen executed his last will and testament.[3] In the preamble, Allen noted a "problem" of great concern to him which apparently was the predominant motivating factor in shaping, as he did, the form of his testamentary disposition.[4] Allen, who had been previously married, quite understandably wanted to be certain that his second wife, Kathleen, would, upon her death, treat Alice Edna Stuhmer, the deceased's daughter by his previous marriage, equally with the three children of his second marriage. To achieve this goal, Allen decided to divide his will into two "Parts."

In Part I, the decedent bequeathed his entire estate to Kathleen on condition that she "sign and execute an agreement suitable to the Surrogate under whose jurisdiction this Will will be probated, and file it in the Surrogate's Court, or any such other place as the Surrogate may direct, under which agreement she is to contract to make a Will and leave her estate, which is to include the assets of her own estate . . . [after certain specific bequests not in issue here] to be shared in equal parts among my four chil-

---

[3] At argument, the Court was advised that Allen, an attorney, drafted his own will.

[4] The preamble to Allen's will stated:

I have the problem of taking care of my daughter Alice Edna Stuhmer, a daughter by my first marriage, in order to fit in with the rights and privileges of my wife and within the arrangements of the law. In an effort to treat all of my children in exactly the same manner, I have arranged this Will in alternate parts. PART I will be effective provided by [sic] wife, Kathleen M. Allen, will make the agreement therein provided in form satisfactory to the Surrogate under whose jurisdiction this Will will be probated. PART II will be effective only in the event that my wife, Kathleen M. Allen, chooses not to make the agreement which I suggest and request, or is unable to do so.

dren . . .'' Part II of Allen's will was to become operative only if Kathleen chose not to make the agreement specified in Part I. In that event, Allen bequeathed to his wife ''such share of my estate as the law requires to be given to a surviving spouse'' and left the residue of the estate to Alice Edna Stuhmer, the daughter of his first marriage.

Allen died on July 28, 1961. On August 6, 1961, Kathleen executed the ''required agreement'' in compliance with Part I of her husband's will; however, the necessary approval by the Surrogate was not obtained until July 1, 1964. In computing the taxes to be paid by Allen's estate, the Executrices sought to obtain the maximum marital deduction, which the Commissioner disallowed in its entirety because Allen's bequest to his wife constituted a non-qualifying terminable interest as described in Internal Revenue Code, of 1954, § 2056(b)(1).[5] The District Judge found that Mrs. Allen's interest more closely resembled a life estate with a broad, but not unlimited, power to consume, see *In re Britt's Will,* 272 App. Div. 426 (3d Dept. 1947); *In re Mitchell's Will,* 15 Misc. 2d 651 (Surr. Ct., Nassau County, 1959); *In re Ingraham's Estate,* 197 Misc. 402

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[5] Internal Revenue Code of 1954, § 2056(b)(1) provides in pertinent part:

> Where, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, an interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed under this section with respect to such interest—
>
> (A) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and
>
> (B) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse . . .

(Surr. Ct., Bronx County, 1950), rather than the surviving spouse's interest under a joint or mutual will, which interest qualified for the marital deduction in *Estate of Vermilya,* 41 T. C. 226 (1963), and in *Newman* v. *United States,* 176 F. Supp. 364 (S. D. Ill. 1959). On this basis, he upheld the Commissioner's determination that Allen's bequest to his spouse was a non-qualifying terminable interest. Compare *Estate of Pipe* v. *Commissioner,* 241 F. 2d 210 (2d Cir.), *cert. denied,* 355 U. S. 814 (1957). We reach the same result as the District Judge, albeit on a different ground.[6]

I

When Congress sought to equalize the tax burdens of estates in community property and common law jurisdictions by utilizing the device of the marital deduction as modified by the terminable interest rule, it chose a technique which required the draftsmen of testamentary instruments to be meticulous in adhering to the formal requirements of section 2056. And, while the terminable interest rule is, indeed, a thicket, the Congressional purpose in disqualifying terminable bequests was certainly not to elevate form above substance. It was, instead, to prevent the wholesale evasion of estate taxes which the skillful employment of terminable interests could have easily achieved. For example, but for the terminable interest rule, a husband in a common law jurisdiction could bequeath a life interest in property to his wife which could qualify for the marital deduction and thus neither be taxed in his nor in her estate. Although the terminable interest rule is aimed primarily at preventing such results, see Sugarman, Estate

[6] The ground on which we rest here was not urged below but was briefed and argued in this Court. But, if right on any theory, the Commissioner's determination should be sustained. *Helvering* v. *Gowran,* 302 U. S. 238 (1937). See also *Towers* v. *Commissioner,* 247 F. 2d 233 (2d Cir. 1957), *cert. denied,* 355 U. S. 914 (1958).

and Gift Tax Equalization, 36 Calif. L. Rev. 223, 230-31, 236-38 (1948), it nevertheless does, at times, ensnare bequests which were designed to accomplish objectives other than the avoidance of estate taxation. For this reason, the Supreme Court has observed, in its most recent pronouncement on the terminable interest rule, that "the achievement of the purposes of the marital deduction [remains] . . . dependent to a great degree upon the careful drafting of wills." *Jackson* v. *United States*, 376 U. S. 503, 511 (1963).

II

While section 2056(a) sets out the basic rule for determining the marital deduction, section 2056(b)(1) disqualifies a terminable interest passing from a decedent to his surviving spouse. A terminable interest is defined, in general, as one which possesses the three characteristics found in sections 2056(b)(1)(A) and (B).[7] First, it must be an interest in property which will terminate upon the occurrence or non-occurrence of an event or upon the lapse of time. Second, another interest in the same property must pass or have passed to someone other than the spouse from the decedent for less than an adequate consideration. And third, such other person must be able to possess or enjoy a part of such property upon the termination of the spouse's interest. With certain exceptions not relevant to this case, the interest bequeathed to a spouse qualifies for the marital deduction unless all three of these characteristics are present.

It is now well settled that the determination of whether an interest is terminable is to be judged in the light of events at the precise moment of the decedent's death. If, viewed at the time of the death, the interest bequeathed to the spouse might terminate under some circumstances,

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[7] See note 5, *supra*.

that interest is terminable for the purposes of section 2056(b)(1) regardless of what subsequent events came to pass. Thus, a reviewing court must focus on the moment of the testator's death to determine the nature of a marital gift for estate tax purposes, unless the Internal Revenue Code expressly provides to the contrary, as in section 2056(b)(3). *Jackson* v. *United States, supra; United States* v. *Edmonson,* 331 F. 2d 676 (5th Cir. 1964); *Bookwalter* v. *Lamar,* 323 F. 2d 664 (8th Cir.), *cert. denied,* 376 U. S. 969 (1963); *United States* v. *Mappes,* 318 F. 2d 508 (10th Cir. 1963); *United States* v. *Quivey,* 292 F. 2d 252 (8th Cir. 1961); *Cunha's Estate* v. *Commissioner,* 279 F. 2d 292 (9th Cir.), *cert. denied,* 364 U. S. 942 (1960); *Starrett* v. *Commissioner,* 223 F. 2d 163 (1st Cir. 1955).

III

Applying these established guidelines to Allen's marital bequest, it is apparent that the devise runs afoul of the terminable interest rule. Viewed at the moment of his death, the bequest to Allen's spouse under Part I of his will was subject to at least two contingencies, each of which could have caused it to fail: (1) Kathleen might not have elected to take under Part I at all; or, (2) even if she had executed the agreement to devise all of her property to Allen's four children equally, there remained the need for the Surrogate's approval and the possibility that he might not give it. If the devise under Part I of the will failed because of these contingencies, Alice Edna Stuhmer, Allen's daughter by his first wife, would have enjoyed or possessed part of her father's property upon the termination of her stepmother's interest. As previously noted, in Part II of his will, Allen bequeathed to Alice an interest in the residue of his estate contingent upon Kathleen's failure to elect to take under Part I. Thus, at the crucial moment of Allen's death, the bequest to his spouse, could

not qualify for the marital deduction because all three characteristics of a terminable interest were present. The interest passing to Allen's spouse under Part I could have lapsed by her failure to execute the "required agreement" or by the refusal of the Surrogate to approve. As a result, a "third party," specifically, Allen's daughter by the first marriage, could have enjoyed or possessed the residue of her father's estate by virtue of the contingent interest which passed to her under Part II.[8]

The Executrices attempt to negate the validity of this analysis by citing Treas. Reg. § 20-2056(e)-2(c)[9] which provides in substance that if a surviving spouse elects a statutory share of the decedent's estate in lieu of dower or curtesy, the property transferred pursuant to that election is deemed to pass from the decedent to the surviving spouse.

---

[8] It has been suggested that since Kathleen would have taken under either Part I or Part II of Allen's will, at least the lesser amount which she stood to inherit under Part II should qualify for the marital deduction. But, the fact is that Kathleen chose to take under Part I and viewed at the moment of Allen's death that interest was terminable in its entirety.

[9] Treas. Reg. § 20-2056(e)-2(c) provides:

This paragraph contains rules applicable if the surviving spouse may elect between a property interest offered to her under the decedent's will or other instrument and a property interest to which she is otherwise entitled (such as dower, a right in the decedent's estate, or her interest under community property laws) of which adverse disposition was attempted by the decedent under the will or other instrument. If the surviving spouse elects to take against the will or other instrument, then the property interests offered thereunder are not considered as having "passed from the decedent to his surviving spouse" and the dower or other property interest retained by her is considered as having so passed. . . . If the surviving spouse elects to take under the will or other instrument, then the dower or other property interest relinquished by her is not considered as having "passed from the decedent to his surviving spouse" . . . and the interest taken under the will or other instrument is considered as having so passed . . .

Urging that since in Part II of his will Allen actually bequeathed to his spouse no more than her statutory share, the Executrices claim that the availability of a choice between Part I and Part II loses significance.

We find this contention unpersuasive. The Regulation on which the Executrices rely was designed to overcome the statutory requirement that property must "pass" from the decedent to his surviving spouse in order to qualify for the marital deduction and is limited to specific situations in which Congress expressly intended the spouse's interest in an estate to qualify for the marital deduction. See section 2056(e)(3). It is undisputed that Kathleen did not elect to take her statutory share in lieu of her inheritance under her husband's will. Indeed, she elected instead to inherit under the will. Consequently, the Regulation is inapposite and there is no escape from the conclusion that Allen's bequest under Part I of his will constitutes a nondeductible terminable interest.

Affirmed.

Appendix A

(JUDGMENT)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-ninth day of March, one thousand nine hundred and sixty-six.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge.

HON. IRVING R. KAUFMAN,
Circuit Judge.

HON. WILFRED FEINBERG,
District Judge.

ELIZABETH JOAN ALLEN and ALICE EDNA STUHMER, individually and as Executrices of the Estate of Chester A. Allen, deceased,

Plaintiffs-Appellants,

against

UNITED STATES OF AMERICA

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

APPENDIX B

(STATUTE INVOLVED)

Internal Revenue Code of 1954:

Sec. 2056 (26 U. S. C. 1958 ed., Sec. 2056).

"Sec. 2056. Bequests, etc., to surviving spouse.

(a) Allowance of marital deduction.—For purposes of the tax imposed by section 2001, the value of the taxable estate shall, except as limited by subsections (b), (c), and (d), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

(b) Limitation in the case of life estate or other terminable interest.—

(1) General rule.—Where, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, an interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed under this section with respect to such interest—

(A) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

(B) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse;"

Appendix B

(Regulation Involved)

Commissioner's Regulation.

Section 20.2056 (e)-2(c).

Regulation Section 20.2056 (e)-2(c) provides as follows:

> "c. Effect of election by surviving spouse. This paragraph contains rules applicable if the surviving spouse may elect between a property interest offered to her under the decedent's will or other instrument and a property interest to which she is otherwise entitled (such as dower, a right in the decedent's estate, or her interest under community property laws) of which adverse disposition was attempted by the decedent under the will or other instrument. If the surviving spouse elects to take against the will or other instrument, then the property interest offered thereunder are not considered as having 'passed from the decedent to his surviving spouse' and the dower or other property interest retained by her is considered as having so passed (if it otherwise so qualifies under this section). If the surviving spouse elects to take under the will or other instrument, then the dower or other property interest relinquished by her is not considered as having 'passed from the decedent to his surviving spouse' (irrespective of whether it otherwise comes within the definition stated in paragraph (a) of this section) and the interest taken under the will or other instrument is considered as having so passed (if it otherwise so qualifies). As to the valuation of the property interest taken under the will or other instrument, see paragraph (b) of § 20.2056(b)-4."

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 292

ELIZABETH JOAN ALLEN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The question presented is whether decedent's bequest to his surviving spouse qualifies for the estate tax marital deduction or whether it constitutes a nondeductible terminable interest. See 1954 Code § 2056.

Under Part I of his will the decedent bequeathed his entire estate to his surviving spouse upon condition that she would, after his death, "sign and execute an agreement suitable to the Surrogate under whose jurisdiction this Will will be probated, and file

it in the Surrogate's Court, or any such other place as the Surrogate may direct, under which agreement she is to contract to make a Will and leave her estate, which is to include the assets of her own estate * * * [after certain specific bequests not in issue here] to be shared in equal parts among my four children * * *" (Pet. 7-8). In Part II of his will decedent provided that, if his widow did not comply with the condition stated in Part I, he bequeathed to her only "such share of my estate as the law requires to be given to a surviving spouse" and bequeathed the residue of his estate to his daughter born to him during his first marriage (Pet. 8). The decedent made this "rather unorthodox bequest * * * to his wife" (Pet. 6) because he wanted to be certain that after his death his widow (who was his second wife) would financially treat his daughter by his previous marriage equally with the three children of his second marriage. After decedent's death, his widow, in accordance with the conditions contained in Part I of his will, executed and filed the prescribed agreement in the Surrogate's Court and took under Part I of the will.

The Commissioner disallowed the claimed marital deduction, and the lower courts upheld the Commissioner's determination (Pet. 5-13). The district court found that what decedent's widow had received under Part I of his will was not a fee simple interest as petitioner contended but rather that her interest "more closely resembled a life estate with a broad, but not unlimited, power to consume" (Pet. 8). Accordingly the district court held that the bequest re-

ceived by decedent's surviving spouse under Part I of his will did not qualify for the marital deduction, since it constituted a terminable interest as defined in Code § 2056(b)(1) and did not fit within the exception to the terminable interest rule contained in § 2056(b)(5).

The court of appeals affirmed the judgment of the district court on the ground that (Pet. 11-12):

> Viewed at the moment of his death, the bequest to Allen's spouse under Part I of his will was subject to at least two contingencies, each of which could have caused it to fail: (1) Kathleen [decedent's surviving spouse] might not have elected to take under Part I at all; or, (2) even if she had executed the agreement to devise all of her property to Allen's four children equally, there remained the need for the Surrogate's approval and the possibility that he might not give it. * * * Thus, at the crucial moment of Allen's death, the bequest to his spouse, could not qualify for the marital deduction because all three characteristics of a terminable interest were present. The interest passing to Allen's spouse under Part I could have lapsed by her failure to execute the "required agreement" or by the refusal of the Surrogate to approve. As a result, a "third party", specifically, Allen's daughter by the first marriage, could have enjoyed or possessed the residue of her father's estate by virtue of the contingent interest which passed to her under Part II.

The judgment below is correct; there is no conflict of decisions, and no general issue of importance is presented.

It is well settled that the terminable-interest rule of 1954 Code § 2056(b)(1) prevents any estate tax marital deduction where the decedent bequeaths to his surviving spouse only a life estate in certain property.[1] For in such a case the happening of an event or contingency (i.e., the surviving spouse's death) may cause another of decedent's devisees or legatees (i.e., the remainderman) to possess or enjoy part of all of such property. 1954 Code § 2056(b)(1). In general, in order for a marital deduction to be allowed, the interest in property of the decedent which passes to his surviving spouse under his will at the moment of his death must be either an interest in fee simple to the property in question —in which event the interest would not be a terminable one under § 2056(b)(1)—or a life estate plus an unlimited power to dispose of the property, either during her life or at her death—in which event there is a specific statutory exception to the terminable-interest rule—see 1954 Code § 2056(b)(5).

Here the district court found that under New York law the interest which decedent's spouse had received pursuant to Part I of his will "closely resembled a life estate with a broad, but not unlimited, power to consume" (Pet. 8). Petitioners do not challenge that

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[1] See *Cunha's Estate* v. *Commissioner*, 279 F. 2d 292 (C.A. 9), certiorari denied, 364 U.S. 942; *Commissioner* v. *Ellis' Estate*, 252 F. 2d 109 (C.A. 3); *In re Reilly's Estate*, 239 F. 2d 797 (C.A. 3); *Stedman* v. *United States*, 233 F. Supp. 569 (D. Mass.); *Harris* v. *United States*, 193 F. Supp. 736 (D. Neb.); cf. *Bookwalter* v. *Lamar*, 323 F. 2d 664 (C.A. 8), certiorari denied, 376 U.S. 969; *United States* v. *Mappes*, 318 F. 2d 508 (C.A. 10).

holding in this Court. Since, under the applicable State law, the unconsumed portion of the property here in question will, upon the widow's death, pass to the residuary legatees named in decedent's will, the bequest to her is a terminable interest under Code § 2056(b)(1). Moreover, since she did not have an unlimited power to dispose of the property, either during her life or at her death, the one exception to the terminable interest rule stated in § 2056(b)(5) does not apply.[2] Therefore, the decision of the district court was correct.

This Court in *Jackson* v. *United States*, 376 U.S. 503, recognized (p. 508):

> * * * that in considering terminability of an interest for purposes of a marital deduction "the situation is viewed as at the date of the decedent's death."

Therefore, the court of appeals concluded that the bequest here in question is a non-deductible terminable interest for a second reason. "[A]t the crucial moment of [decedent's] death, the bequest to his spouse * * * under Part I [of his will] could have lapsed by her

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[2] See *United States* v. *Lincoln Rochester Trust Co.*, 297 F. 2d 891 (C.A. 2), certiorari denied, 369 U.S. 887; *May's Estate* v. *Commissioner*, 283 F. 2d 853 (C.A. 2), certiorari denied, 366 U.S. 903; *Commissioner* v. *Ellis' Estate*, 252 F. 2d 109 (C.A. 3); *Pipe's Estate* v. *Commissioner*, 241 F. 2d 210 (C.A. 2), certiorari denied, 355 U.S. 814; cf. *United States* v. *First Nat. Trust & Sav. Bank of San Diego*, 335 F. 2d 107 (C.A. 9); *Peyton's Estate* v. *Commissioner*, 323 F. 2d 438 (C.A. 8); *Piatt* v. *Gray*, 321 F. 2d 79 (C.A. 6); *Shedd's Estate* v. *Commissioner*, 237 F. 2d 345 (C.A. 9), certiorari denied, 352 U.S. 1024; *Starrett* v. *Commissioner*, 223 F. 2d 163 (C.A. 1).

failure to execute the 'required agreement' * * * [and as] a result, a 'third party', specifically, Allen's daughter by the first marriage, could have enjoyed or possessed the residue of her father's estate * * *" (Pet. 11).

There is no conflict of decisions, and the "unorthodox bequest" (Pet. 6) here in question does not present any recurring or important problem in the administration of the revenue laws. The petition for certiorari should be denied.

Respectfully submitted,

THURGOOD MARSHALL,
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JULY 1966.

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SUPPLEMENTAL MEMORANDUM FOR PETITIONERS

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of Counsel.

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against

UNITED STATES OF AMERICA.

SUPPLEMENTAL MEMORANDUM FOR PETITIONERS

The Government in its memorandum in opposition to the petition for the writ of certiorari maintains that the Circuit Court of Appeals affirmed the judgment of the district court on the basis of the reasoning of the district court, and attributes the affirmance of the judgment of the district court to the legal theory set forth in the opinion of the district court.

However, petitioners respectfully submit that the Circuit Court of Appeals rejected the District Court's legal reasoning. The attention of this court is respectfully directed to Appendix A, page 9, of petitioners' petition for the writ of certiorari. Note—The Circuit Court of Appeals said, "We reach the same result as the District Judge, albeit on a different ground.[6]". The court's attention is further directed to footnote No. 6 in the Circuit Court of Appeals opinion that "[6]The ground on which we rest here was not urged below but was briefed and argued in this

Court. But, if right on any theory, the Commissioner's determination should be sustained."

The Court of Appeals obviously sustained the Commissioner's disallowance but did not accept the legal basis applied by the district court.

Petitioners' appeal is from the decision of the Court of Appeals holding that the interest of the surviving spouse must be determined "at the crucial moment of decedent's death". The decedent's surviving spouse was entitled under decedent's will to a one-third interest in his estate whether she elected under Part II or accepted the alternate provision for her under Part I of his will. Petitioners maintain that the interest bequeathed qualified for the marital deduction because of Regulation 20-2056(e)-2(c) which allows for the contingency or necessity of a surviving spouse having to elect between alternate provisions of the will.

Respectfully submitted,

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